

PROCEEDINGS IN AID OF EXECUTION

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Often-times the judgments which are the easiest to obtain are the most difficult to collect. The judgment creditor is unable to locate tangible assets belonging to the judgment debtor upon which execution can be levied. To assist the judgment creditor in locating property which can be applied to the satisfaction of a judgment, statutes have been enacted under the provisions of which the judgment and third persons can be compelled to attend before a judge or referee to testify concerning the property of the judgment debtor. These provisions are often referred to as "proceedings in aid of execution."¹

The term "proceedings in aid of execution" has been held to include actions in the nature of a creditor's bill brought under the provisions of OHIO REV. CODE 2333.01². This is the subject of a separate article in this series and will not be discussed under this heading.

The Ohio Revised Code contains separate provisions regulating proceedings in courts of common pleas³ and before justices of the peace,⁴ although, in those respects of which no special provision is made in the chapters relating to justices of the peace, the provisions relating to courts of common pleas are applicable.⁵ Proceedings in probate courts⁶ and municipal courts⁷ are governed by the common pleas court procedure.

In this article, we intend to approach the subject from a practical point of view. The law relating to the subject is found in the above cited sections of the Revised Code of Ohio and is ably discussed in 17 *Ohio Jurisprudence* under the title "Executions," Sections 537 to 614, both inclusive. To attempt to cover the subject completely from a legal standpoint would unduly extend the length of this article.

Of course, the first prerequisite to the commencement of a proceeding in aid of execution is a judgment against the debtor. In some cases, an execution must first be issued⁸ and in others must also be returned unsatisfied⁹ before the proceedings can be commenced. If personal earnings are to be attached, written demand must be made upon the judgment debtor not less than five days nor more than thirty days before the order in aid of execution is sought.¹⁰

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¹ Chapter 2333 of the OHIO REV. CODE is headed: "Proceedings in Aid of Execution."

² *Hegler v. Grove*, 63 Ohio St. 404, 59 N.E. 162 (1900).

³ OHIO REV. CODE §2333.01, et seq. (11760).

⁴ OHIO REV. CODE §1917.37, et seq. (10436).

⁵ OHIO REV. CODE §1907.42 (10490); *Hallanan v. Crow*, 15 Ohio St. 176 (1864).

⁶ OHIO REV. CODE §1901.21 (1599).

⁷ OHIO REV. CODE §2101.32 (10501-22).

⁸ OHIO REV. CODE §2333.10 (11769).

⁹ OHIO REV. CODE §§2333.09, 2333.13 (11768, 11772).

¹⁰ OHIO REV. CODE §§1911.40, 2715.02 (10272, 11828-1).

Also local court rules frequently require that an affidavit in compliance with the Soldiers' and Sailors' Civil Relief Act of 1940¹¹ must be filed before a proceeding in aid of execution will be issued.¹² Local rules also often require that costs be deposited in advance at the time the proceedings are commenced.¹³ Therefore, the rules of the specific court in which the remedy is to be sought should be consulted before any action is taken.

PROCEDURE IN COURTS OF COMMON PLEAS

The procedure in courts of common pleas applies also to proceedings in probate courts and municipal courts and, in some respects, to proceedings before justices of the peace.

Under the first statutory provision,¹⁴ before an order is sought for the examination of a debtor, an execution must be issued to the sheriff of the county in which the judgment debtor resides, or if he does not reside in the state, to the sheriff of the county in which the judgment was rendered, or a transcript of the judgment of a justice of the peace has been filed. If such execution is returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order from a probate judge or a judge of the court of common pleas *in the county to which such execution was issued*, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place *within the county*, to be specified in the order.

It will be noted that the proceedings are to be commenced and the hearing held in the county to which the execution was issued which may or may not be the same county in which the judgment was rendered.

As a matter of practice, the judgment creditor first causes the execution to be issued and, as soon as it is returned unsatisfied, files in the proper court an application or motion, supported by an affidavit, containing the necessary facts. The court then signs the order, which together with a minute of his proceedings signed by him is filed with the clerk, who enters on his execution docket the time of its filing.¹⁵ The judgment creditor then files a praecipe with the clerk requesting that an order in aid of execution be issued. The clerk then issues the order to the proper sheriff who serves it in the same manner as a summons is served.¹⁶

The court may refer the matter to a referee agreed upon or appointed by the judge to report the evidence or the facts.¹⁷ Parties and

¹¹ 50 U.S.C.A., APP. 501 et seq.

¹² Lucas County Court of Common Pleas Rule No. 27; Toledo Municipal Court Rule No. 27.

¹³ Lucas County Court of Common Pleas Rule No. 22; Toledo Municipal Court Rule No. 29.

¹⁴ OHIO REV. CODE §2333.09 (11768).

¹⁵ OHIO REV. CODE §2333.25 (11785).

¹⁶ OHIO REV. CODE §2333.25 (11785).

¹⁷ OHIO REV. CODE §2333.16 (11775, 11776).

witnesses may be compelled by an order of the judge or by subpoena to attend before the judge or referee to testify.¹⁸ Parties or witnesses who disobey orders of the judge, court or referee, issued and served upon them, may be punished for contempt. If an order of the referee is disobeyed he reports it to the court who may punish for contempt.¹⁹

Persons appearing to testify are not excused from answering any question on the ground that their examination will tend to convict them of fraud but their answers cannot be used against them in a prosecution for such fraud.²⁰ All examinations and answers must be under oath. When a corporation answers, the answer must be on the oath of an officer thereof. If the examination is before a referee, he certifies the evidence or the facts to the court.²¹

At the hearing the judgment debtor and other witnesses who appear may be fully examined concerning any property belonging to the judgment debtor or in which he may have an interest. It is, therefore, advisable that the attorney conducting the examination obtain as much information concerning the judgment debtor as possible before commencing the examination. Frequently such information can be obtained from the judgment creditor or neighbors or acquaintances or employers of the debtor, or credit bureaus, banks, trades people, court records or records in the county recorder's office. Inquiry should be made concerning his employment, past and present, his ownership of real estate, automobiles and other chattel property, securities, bank accounts, life insurance, promissory notes, and accounts and debts receivable. If the judgment debtor has recently transferred or encumbered property, full inquiry should be made concerning the transaction. If the attorney has armed himself with this information he can more effectively examine the judgment debtor and locate property which may be applied to the satisfaction of the judgment.

If the examination of the judgment debtor discloses that he has property or that there is money owing to him which is not exempt from execution, whether it is in his own hands or in possession of some other person or corporation, the court may order it applied to the satisfaction of the judgment.²²

Another section of the code²³ provides that after execution is issued but before its return, and on proof by affidavit, or otherwise, to the satisfaction of the *probate or common pleas judge of the county in which the debtor is found*, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such

¹⁸ OHIO REV. CODE §2333.17 (11777).

¹⁹ OHIO REV. CODE §2333.19 (11779).

²⁰ OHIO REV. CODE §2333.15 (11774).

²¹ OHIO REV. CODE §2333.18 (11778).

²² OHIO REV. CODE §2333.21 (11781).

²³ OHIO REV. CODE §2333.10 (11769).

judge may require the debtor to appear at a time and *place in such county*, to answer concerning it.²⁴

It is further provided that, instead of the order mentioned in the preceding paragraph, the judge upon proof in writing to his satisfaction, by affidavit of the judgment creditor or otherwise, that there is danger of the debtor leaving the state or concealing himself to avoid such examination, may issue a warrant requiring the sheriff to arrest and bring such debtor before such judge. This warrant can only be issued by a judge of the court of the county in which such debtor is found and the sheriff can only execute it in that county. In executing the warrant, the sheriff must deliver to the debtor a copy thereof and of the testimony on which it is issued.²⁵

Excepting for the difference in the language of the application and affidavit, the procedure for obtaining the issuance of the order or the warrant under these sections is the same as that outlined above.

When the debtor is arrested and brought before the judge, he and the other witnesses are examined under oath and if, in the examination, it appears that there is danger of the debtor's leaving the state, or that he has property which he unjustly refuses to apply to the judgment, he may be ordered to enter into a bond, with surety, in such sum as the judge prescribes that he will attend before the judge or referee for examination from time to time as directed. If he fails to enter into such bond, he may be committed to the county jail, by warrant of the judge, as for contempt.²⁶

Provision is next made for examination of debtors of the judgment debtor.

When execution against a judgment debtor has been returned, the judgment creditor may then file an application for an order requiring that a person or corporation indebted to the judgment debtor or holding property belonging to him appear and answer.²⁷ If the judge is satisfied by affidavit or other written proof that such person or corporation is indebted to the judgment debtor, or has property belonging to him, the judge may issue an order requiring such person or corporation, or any officer or member of the corporation, to appear at a specified time and place within the *county wherein such order is served* and answer concerning it.²⁸ Such an order may also be issued before the issuance and return of execution if the judge is satisfied by affidavit of the judgment creditor, his agent or attorney, that grounds for attachment exist.²⁹ The judge may require such notice as he deems proper to be given to any party to the action.³⁰ The order shall be in writing and signed by the

²⁴ OHIO REV. CODE §2333.10 (11769).

²⁵ OHIO REV. CODE §2333.11 (11770).

²⁶ OHIO REV. CODE §2333.12 (11771).

²⁷ OHIO REV. CODE §2333.13 (11772).

²⁸ OHIO REV. CODE §2333.13 (11772).

²⁹ OHIO REV. CODE §2333.14 (11773).

³⁰ OHIO REV. CODE §2333.14 (11773).

judge who makes it and shall be served as a summons.³¹ If the judge requires that notice be given, the judgment creditor should then file his praecipe with the clerk requesting that such notice issue.

It will be noted that if such an order is sought after return of execution, the proof required may be by affidavit or other written proof, but if the order is sought before execution is issued, the proof must be by affidavit.

The order binds any property, money or credits belonging to the judgment debtor which is in the hands of or under the control of the person or corporation served with the order from the time the order is served and such person or corporation is liable to the judgment creditor therefor.³² The same section of the code also apparently provides that property, money or credits due from the judgment debtor to the person or corporation served with the order are bound by the order. The language is as follows:

From the time of its service, property, money, or credits in the hands, or under the control of the person so served, belonging to the judgment debtor, *or due from him to such person or corporation*, shall be bound, and he or it made liable to the judgment creditor therefor. (Emphasis supplied.)³³

Apparently an error was made in the codification of the above quoted provision of the statute. It was originally enacted on March 30, 1874.³⁴ It then read as follows:

The service of such order shall bind the property in the possession or under the control of such person or corporation from the time of service, and the person or corporation so served with the order aforesaid shall stand liable to the judgment creditor for all property, moneys and credits in his hands, *or due from such person or corporation to the judgment debtor* from the time he is served with said order. (Emphasis supplied.)

When this section was carried into the Revised Statutes, this clause was as follows:

... and the person or corporation so served with the order shall be liable to the judgment creditor for all property, money, and credits, in his hands belonging to the judgment debtor, *or due to him from such person or corporation*, from the time of service ... (Emphasis supplied.)³⁵

In 1910 the Ohio statutes were recodified and called the Ohio General Code and in this recodification the words were apparently transposed and first appeared in their present form.³⁶ We have found no cases construing this clause but do not believe that a court would construe the clause literally as it now appears in the Revised Code.

³¹ OHIO REV. CODE §2333.25 (11785).

³² OHIO REV. CODE §2333.13 (11772).

³³ OHIO REV. CODE §2333.13 (11772).

³⁴ 71 OHIO LAWS 53

³⁵ OHIO REV. STAT. 5475

³⁶ Page & Adams Annotated OHIO GENERAL CODE §11772 (1912).

The hearing proceeds in the same manner as the examination of the judgment debtor himself which is discussed above and the same sanctions are available to the judgment creditor to compel the testimony of the witnesses. However, it is common practice for the person or corporation served with such an order to write a letter to the clerk or to file a verified answer or affidavit stating what property, if any, of the judgment debtor was held at the time of the service of the order. Then if the judgment creditor desires further information, the person or corporation is called in for personal examination. This seldom happens.

A debtor of the judgment debtor may save himself the time and inconvenience of being subjected to this procedure by voluntarily paying to the sheriff or bailiff, as the case may be, the amount of his debt or so much thereof as will satisfy the execution after execution against property of the judgment debtor has been issued.³⁷ A receipt from the sheriff or bailiff shall be a sufficient discharge for the amount so paid or directed to be credited by the judgment creditor on the execution.³⁸

The judgment creditor in proceedings in aid of execution may also apply for the appointment of a receiver of the property of the judgment debtor.³⁹ By order, the court may appoint the sheriff of the proper county, or other suitable person, as receiver of the property of the judgment debtor and also forbid a transfer or other disposition of or interference with the property of the judgment debtor.⁴⁰ If the sheriff is appointed receiver, he and his sureties are liable on his official bond as such receiver, but if another person is appointed, he must take oath and give bond.⁴¹

If the judgment debtor has an interest in real estate, the receiver may be ordered to sell such interest if the interest of the judgment debtor is such that it can be ascertained without controversy with other persons having an interest in the same property.⁴² The sale is conducted in the same manner as the sale of real estate under execution and the proceedings before the execution of the deed must be approved by the court which rendered the judgment or in which the transcript was filed.⁴³

PROCEDURE BEFORE JUSTICES OF THE PEACE

Procedure before a justice of the peace is much the same as in municipal courts or common pleas courts. The judgment creditor should be prepared to pay costs in advance, especially witness fees, and to file an affidavit in compliance with the Soldiers' and Sailors' Civil Relief Act of 1940.⁴⁴ If personal earnings of the judgment debtor are to be attached,

³⁷ OHIO REV. CODE §2333.20 (11780).

³⁸ OHIO REV. CODE §2333.20 (11780).

³⁹ OHIO REV. CODE §2333.22 (11782).

⁴⁰ OHIO REV. CODE §2333.22 (11782).

⁴¹ OHIO REV. CODE §2333.23 (11783).

⁴² OHIO REV. CODE §2333.24 (11784).

⁴³ OHIO REV. CODE §2333.24 (11784).

⁴⁴ 50 U.S.C.A., APP. 501 et seq.

notice must be given to the judgment debtor in the same manner as in common pleas courts.⁴⁵

The judgment creditor, his agent or attorney, first must file an affidavit or verified application with the justice of the peace who rendered the judgment, or his successor, stating that he has good reason to believe and does believe that the person, partnership or corporation named therein is liable to the judgment debtor for a sum of money, whether then due or not, and that it is not exempt from execution.⁴⁶ The justice shall then issue an order to the person, partnership or corporation to appear before him at his office at a specified time and place not less than five nor more than fifteen days from the date of the order to answer under oath respecting such liability.⁴⁷ The justice must sign this order and then it is served and return made in the same manner as a summons with the return stating the exact time of service.⁴⁸ If the judgment debtor can be found within the county, he must be given notice of the hearing which must be served in the same manner as a summons at least three days before the hearing.⁴⁹

From the time of the service of the order, the person, partnership or corporation served is liable to the judgment creditor for such amount of money which it was then liable for to the judgment debtor, and not exempt from execution, whether then due or not, as far as is necessary to satisfy the judgment including costs of the proceedings in aid.⁵⁰

If the partnership, corporation or person so served appears and answers, he shall be examined under oath concerning any money for which he is liable and the justice shall hear any evidence respecting it.⁵¹ The person, partnership or corporation served with notice to appear may demand and receive fees as witnesses in civil cases.⁵² The justice may also subpoena witnesses to testify concerning such liability.⁵³ If the party served with notice fails to appear and it is shown that the order was served not less than five days before the time for appearance or if the party appears and refuses without good cause to answer any proper question, the justice may proceed the same as if that party had admitted money in his hands sufficient to satisfy the judgment and costs.⁵⁴

If it appears from the examination or by admission that a party is liable to the judgment debtor for any money, whether sufficient to satisfy the judgment or not, the justice must order the party to pay such money, or as much thereof as may be necessary, to the judgment creditor, but if

⁴⁵ OHIO REV. CODE §1911.40 (10272).

⁴⁶ OHIO REV. CODE §1917.37 (10436).

⁴⁷ OHIO REV. CODE §1917.37 (10436).

⁴⁸ OHIO REV. CODE §1917.38 (10437).

⁴⁹ OHIO REV. CODE §1917.38 (10437).

⁵⁰ OHIO REV. CODE §1917.38 (10437).

⁵¹ OHIO REV. CODE §1917.39 (10438).

⁵² OHIO REV. CODE §1917.44 (10443).

⁵³ OHIO REV. CODE §1917.37 (10436).

⁵⁴ OHIO REV. CODE §1917.39 (10438).

it is shown that the money is not yet due, the order shall be to pay the money at a specific time when it has become due.⁵⁵ The money so paid shall first be applied to the costs and the balance to the judgment.⁵⁶

The judgment creditor is given the right to enforce the order by a civil action against a party who fails to comply with the pay-in-order. The proceeding is the same as other civil actions and the judgment may be for whatever the party owes the judgment debtor not to exceed the amount of the order and the costs of the proceeding against the party.⁵⁷

JUDGMENTS AGAINST RAILROAD COMPANIES

Special provisions are made covering garnishments to collect judgments against railroad companies upon claims due to common laborers for work and labor performed for the company, or for cross-ties, lumber, or wood furnished thereto, to be used in the construction, repair or operation of their roads or for erection of fences along the lines of their roads, required by law to be erected, or upon a note, or other evidence of indebtedness given for such considerations.⁵⁸ These sections of the code are seldom, if ever, applied and will not be discussed in detail.

DEVELOPMENT OF LOCAL PRACTICES

Because of the overlapping and sometimes contradictory provisions of the statutes relating to garnishments, proceedings in aid of execution and exemptions from execution, there has been much confusion in the minds of the judges and the lawyers concerning the proper application of the same. As a result the courts and the lawyers who most often resort to these provisions of the law for the collection of judgments have developed and follow certain practices in their jurisdictions providing practical solutions to the problem but which may not be in strict conformity to the law.

Illustrative of the confusion in the minds of the court and the lawyers is a case decided by the Supreme Court of Ohio on March 6, 1946.⁵⁹ In that case a judgment had been recovered in the Court of Common Pleas of Hamilton County. The judgment creditor commenced a proceeding in aid of execution in an attempt to collect the judgment. This proceeding should have been governed by the provisions of Ohio Gen. Code §§11768 et seq. (OHIO REV. CODE '2333.09 et seq.) which govern proceedings in aid of execution. However, in deciding the case, the Court made no reference to those sections but, instead, applied the provisions of Ohio Gen. Code §§11828, 11830, 11847, and 11851 (OHIO REV. CODE §§2715.11, 2715.13, 2715.29, 2715.33) which are

⁵⁵ OHIO REV. CODE §1917.40 (10439).

⁵⁶ OHIO REV. CODE §1917.40 (10439).

⁵⁷ OHIO REV. CODE §1917.41 (10440).

⁵⁸ OHIO REV. CODE §§2333.02 (11761) to 2333.08 (11767) both inclusive.

⁵⁹ Peoples Bank & Savings Co. v. Katz, 146 Ohio St. 297, 65 N.E. 2d 708 (1946).

applicable to garnishment proceedings before judgment and were wholly inapplicable to the case under consideration.⁶⁰

In practice, lawyers, being uncertain of the rights of their clients under these statutes, have been inclined to work out agreements between the judgment creditor, the judgment debtor and the garnishee. This remedy is most frequently used in cases where the judgment debtor is a wage earner whose wages are attached. The amount involved is usually too small to warrant any extended litigation so the lawyers and parties agree among themselves as to how much should be withheld by the employer and paid to the clerk of the court to apply on the judgment. Frequently the debtor is not represented by counsel but makes an agreement with the attorney for the judgment creditor to make regular periodic payments to apply on the judgment. Sometimes arrangements are made with the employer to pay such amounts directly to the judgment creditor. When the agreement is completed an order is submitted, usually by the attorney for the judgment debtor, either discharging the garnishee or ordering a portion of the sum withheld paid to the clerk of the court.

In other cases, where no agreement is reached, and the judgment debtor does not appear but the garnishee reports property or money in his possession subject to the order of the court, the Court orders the entire amount or so much thereof as will satisfy the judgment paid in to court. If the judgment debtor appears to claim his exemptions they are allowed and the balance distributed to the judgment creditor. If he does not claim his exemptions the entire sum is applied toward the satisfaction of the judgment.

PROCEDURE WHEN MORE THAN ONE CREDITOR ATTEMPTS TO ATTACH SAME DEBTOR'S WAGES

Sometimes more than one creditor attempts to attach the same debtor's wages. In such cases questions are raised as to how the exemptions shall be applied and how the portion not exempt shall be distributed. One statute⁶¹ specifically provides that the exemption statutes⁶² shall apply to all courts. It has been held that, regardless of the number of creditors,

⁶⁰ The court's failure to apply the proper sections of the code is difficult to explain. Examination of the briefs filed in the case discloses that the only code sections relative to this subject cited by the lawyers were OHIO GEN. CODE §§11760 and 11772 (OHIO REV. CODE §§2333.01 and 2333.13) both of which relate to proceedings after judgment. The briefs make no reference to the code sections cited by the Court. Also, in appellant's brief, the first legal question presented for the Court's consideration is:

(1) A construction of the Statutes with reference to "Proceedings in Aid of Execution," as provided in Chapter 2 of Title 4, Division 5 and especially §11,772 Ohio Gen. Code, "Examination of Debtor of Judgment Debtor."

The Supreme Court in its opinion makes no reference to OHIO GEN. CODE §11772.

⁶¹ OHIO REV. CODE §2329.69 (11728).

⁶² OHIO REV. CODE §§2329.62 (11721) to 2329.83 (11740) both inclusive.

the debtor is entitled to hold exempt from garnishment that portion of his earnings which are exempt under the law and that the judgment creditors collectively must satisfy their claims out of the non-exempt portion.⁶³ This would seem to be a reasonable interpretation of the law and in accordance with its spirit.

While the statutes relating to garnishment and proceedings in aid do not specifically regulate the priorities between creditors in those cases where multiple garnishments or proceedings in aid are attempted, such proceedings are a part of the general group of statutes relating to enforcement of judgments and the rules applicable to attachments and executions are helpful in determining this issue. The statutes provide that when there are several orders of attachment against the same defendant, they shall be executed in the order in which they are received.⁶⁴ It has been held that an attachment is subject to prior attachments and executions levied against the same property, and is prior to subsequent attachments and executions levied on the same property.⁶⁵ The statutes also provide that when two or more writs of execution are delivered to the officer to whom they are directed on the same day, no preference shall be given to either of said writs and that if a sufficient sum of money is not made to satisfy all of such executions, the amount made shall be distributed to the several creditors in proportion to the amounts of their several demands. In all other cases the writ first delivered to the officer must be the first satisfied.⁶⁶

It would seem that the same rule should be applied to orders in aid of execution issued against a judgment debtor. However, a practice has developed in some jurisdictions whereby when several judgment creditors attach the wages of a single debtor and his employer reports that he is indebted to the debtor in a specified amount and pays the money into court, the non-exempt portion of the money paid in is divided among the several creditors regardless of the order in which their writs were served. This has received the tacit approval of the judges and the lawyers involved and has been a practical way of avoiding a contest between the creditors over priorities.

Provision is made in the justice code⁶⁷ and also in the general attachment statutes⁶⁸ to the effect that when the same person is made garnishee by several parties, on motion of any of the plaintiffs, the amounts and priorities of the several attachments may be determined by the justice in

⁶³ *Bulla v. Kent*, 2 Ohio L.R. 340, 15 Ohio Dec. 409 (1904); *Colonial Finance Co. v. Evans*, 3 Ohio Op. 206 (1935); *Kleinman v. Brown*, 30 Ohio N.P. (N.S.) 69 (1932).

⁶⁴ OHIO REV. CODE §2715.08 (11825).

⁶⁵ *Malkey v. Ruggles*, 24 Ohio N.P. (N.S.) 433 (1923).

⁶⁶ OHIO REV. CODE §2329.10 (11665), see also OHIO REV. CODE §1917.36 (10435).

⁶⁷ OHIO REV. CODE §1911.52 (10284).

⁶⁸ OHIO REV. CODE §2715.41 (11859).

cases pending before him and by reference in cases pending in the courts of common pleas.

DILEMMA OF GARNISHEE

We next call attention to the dilemma faced by an employer who is served with an order in aid of execution or a garnishment of the wages of one of his employees. Perhaps he knows that the employee has a family to support and is badly in need of his earnings. Maybe the employee is basically an honest man who regularly pays his bills but has been ill or had illness in his family and accumulated debts which he has been unable to pay. According to the order served upon him the employer is required to hold all money due the employee until it is released by the court. He wants to give his employee the exempt part of his earnings but he also wants to fulfill his obligations to the court. He is required to decide at his peril whether he shall pay anything to his employee or not.

The statutes governing garnishment provide that when any part of the earnings of the debtor is not exempt from levy or execution, the garnishee process is in force from the time of its service on the garnishee until the trial and binds all such earnings due at the time of service, and which become due from that time until the trial of such cause.⁶⁹ Another section provides that in actions before justices of the peace the garnishee may pay to the debtor an amount equal to the personal earnings of such debtor exempted by law, less the sum of two dollars and a garnishee fee not exceeding fifty cents.⁷⁰ Another section provides that the garnishee may pay to the debtor an amount equal to ninety per cent of his personal earnings, due when the process is served or becoming due thereafter until trial, and be released from any liability to such creditor therefor.⁷¹ On the other hand under the common pleas court provisions relating to proceedings in aid of execution only property, money or credits in the hands or under the control of the person served and belonging to him are bound.⁷²

From the foregoing it might seem that the employer had no problem. However, it has been held by the courts that the exemption is a personal privilege which must be claimed by the person entitled to it and cannot be claimed by the garnishee in his behalf.⁷³ If the debtor fails to personally claim his exemption in the court and the garnishee pays the money over to the debtor, even though it would have been exempt if the debtor had made his claim, this will not serve as a defense for the garnishee.⁷⁴

⁶⁹ OHIO REV. CODE §1911.38 (10270), §2715.30 (11848).

⁷⁰ OHIO REV. CODE §1911.39 (10271).

⁷¹ OHIO REV. CODE §2715.30 (11848).

⁷² OHIO REV. CODE §2333.13 (11772).

⁷³ *Conley v. Chilcote*, 25 Ohio St. 320 (1874); *McComb v. Thompson*, 42 Ohio St. 139 (1884); *Pennsylvania Railroad Co. v. Bell*, 22 Ohio App. 67, 153 N.E. 293 (1925).

⁷⁴ *Conley v. Chilcote*, 25 Ohio St. 320 (1874); *Pennsylvania Railroad Co. v. Bell*, 22 Ohio App. 67, 153 N.E. 293 (1925).

It will readily be seen that under these circumstances the employer pays his employee at his peril and by doing so runs the risk of being compelled to pay the same debt again when sued by the judgment debtor who had the order in aid of execution issued.

Then we have the employer who has a place of business in the State of Ohio and is subject to service of process therein but who has employees working for him in other states.

This employer is served with an order in aid of execution upon a judgment rendered against his employee working in some other state. At the time the order is served this employer may owe the employee a substantial amount of money but before he can locate the employee and ascertain these facts, the employee may have been paid and left his employ. If he owed him the money at the time he may nevertheless be liable to the judgment creditor and be compelled to pay the debt twice.⁷⁵ The Supreme Court has held that tangible personal property belonging to a judgment debtor sued in Ohio and located outside the State of Ohio but in possession of a corporation subject to process in Ohio could not be reached by the garnishment process.⁷⁶ However, that Court has also held that a judgment creditor holding an Ohio judgment can, by means of an order in aid of execution reach the wages of a person employed outside of the State of Ohio by a foreign corporation doing business in Ohio and amenable to process therein even though such wages were payable in another state.⁷⁷ It will thus be seen that the laws of Ohio upon these subjects need revision and clarification.

PROPERTY REACHED BY PROCEEDING

In some cases not only money but other property may be reached by means of a proceedings in aid of execution.

In proceedings in aid of execution in common pleas courts, a judgment creditor may reach "property, money or credits in the hands, or under the control of" another.⁷⁸ Thus a judgment creditor may subject to his judgment any property, money or credits in which the judgment debtor has a clearly ascertainable, fixed, legal interest. Equitable interests or contingent interests of the judgment debtor must be the subject of a creditor's bill. The following are examples of the items which may be reached through proceedings in aid: money which the judgment debtor has fraudulently sent out of the state;⁷⁹ automobile in possession of third party;⁸⁰ salaries and wages of county officials and employees;⁸¹ salaries

⁷⁵ Conley v. Chilcote, 25 Ohio St. 320, (1874).

⁷⁶ Buckeye Pipe Lines Co. v. Fee, 62 Ohio St. 543, 57 N.E. 446 (1900).

⁷⁷ Ohio Loan & Discount Co. v. Siemen, 142 Ohio St. 384, 52 N.E. 2d 525 (1943).

⁷⁸ OHIO REV. CODE §2333.13 (11772).

⁷⁹ Wilson v. Columbia Casualty Co., 118 Ohio St. 319, 160 N.E. 906 (1928).

⁸⁰ Wilder v. Martin, 83 Ohio App. 209, 81 N.E. 2d 630 (1948).

⁸¹ Urich v. Kolesar, 132 Ohio St. 115, 5 N.E. 2d 335 (1936).

and wages of state officers and employees;⁸² and, assets of corporation being liquidated according to OHIO REV. CODE §1701.91.⁸³

However, the judgment creditor seeking aid of execution in a justice court is not so fortunate. In proceedings in justice courts, he may reach only money which is owed his judgment debtor whether the money is then due or not.⁸⁴ Even though the money need not be then due, it must be money which the third party is unconditionally obligated to pay to the judgment debtor and not a conditional or a contingent debt.⁸⁵

ENFORCEMENT OF ORDERS

Finally, we have the problem of enforcement of orders in aid of execution. In proceedings before justices of the peace specific provision is made for enforcement of such orders by a civil action against the person who fails to comply with the order.⁸⁶ It has been held that the garnishee is not a party to the action; that he does not have his day in court in that action; that the order of the justice is not a judgment charging the garnishee and does not determine the ultimate rights of the parties; that this can only be enforced by actions as in other cases; that in legal effect it is an assignment to the plaintiff of defendant's right in the claim and authorizes plaintiff to sue thereon in his own name if the order is not complied with; and, that in such action the garnishee may interpose any offset or defense he may have against the action, notwithstanding the order of the justice and no judgment should be rendered against him that will not be a protection against the rights of third persons.⁸⁷ It has also been held that in such action by the judgment creditor against the garnishee, the petition must set forth not only the proceedings before the justice, but also an allegation that the garnishee is in fact indebted to the judgment debtor.⁸⁸

The statutes relating to proceedings in aid of execution in the common pleas courts make no specific provision for the enforcement of an order against the garnishee by an independent civil action. The code provides that if a "person . . . disobeys an order of the judge, court, or referee, issued and served . . . such person may be punished as for contempt . . ."⁸⁹

The courts have ruled that where in proceedings in aid of execution from the examination it appears that there is a dispute concerning title to the property which is sought to be applied to the satisfaction of the judgment as belonging to the judgment debtor, a person cannot be im-

⁸² OHIO REV. CODE §115.46 (260).

⁸³ *Mickels v. Cowie Cut Stone Co.*, 34 Ohio App. 442, 171 N.E. 251 (1929).

⁸⁴ OHIO REV. CODE §1917.37 (10436).

⁸⁵ *Pettit Bros. Hardware Co. v. City of Akron*, 23 Ohio App. 233, 155 N.E. 396 (1925).

⁸⁶ OHIO REV. CODE §1917.41 (10440).

⁸⁷ *Secor v. Witter*, 39 Ohio St. 218 (1883).

⁸⁸ *Wilson Co. v. Cleveland Electric Railway Co.*, 7 Ohio Cir. Ct. (N.S.) 258, 18 Ohio Cir. Dec. 159 (1905).

⁸⁹ OHIO REV. CODE §2333.19 (11779).

prisoned as for a contempt for refusal to obey an order of the court to so apply the property.⁹⁰ In such cases a receiver should be appointed who should resort to the ordinary remedy by action against the garnishee⁹¹ or the judgment creditor may proceed against the garnishee by civil action.⁹²

However, where an order has been made, commanding a judgment debtor to apply to the payment of a judgment money belonging to him and under his absolute control and disposition, which he has received and wrongfully and fraudulently sent out of the state with intent to prevent the same from being applied on said judgment, and the judgment debtor has not exercised due diligence to comply with such order in aid of execution, the court may order him confined for contempt of court until he complies with such order.⁹³ Also, when the order requires the judgment debtor to deliver or pay specific property or money to a receiver and when he, by his own examination, discloses that he has such property or money under his control and in his possession and fails to obey the order he may be punished for contempt.⁹⁴

In one case it was suggested that, where the garnishee refused to obey the order because of a dispute as to the title of the property, the judgment creditor should have recourse to the plenary action provided by OHIO GEN. CODE §11760 (OHIO REV. CODE §2333.01) to which all claimants could and should be made parties.⁹⁵

APPEAL

Orders directing a garnishee to pay money or deliver property to a receiver or to the court, or the refusal of such orders are final orders as to the parties⁹⁶ and may be appealed by them on questions of law, but as to the garnishee they are not final orders and are not appealable.⁹⁷ In

⁹⁰ *Union Bank v. Union Bank*, 6 Ohio St. 254 (1856); *Edgarton & Wilcox v. Hanna, Garretson & Co.*, 11 Ohio St. 323 (1860); *White v. Gates*, 42 Ohio St. 109 (1884); *In re Concklin*, 5 Ohio Cir. Ct. 78, 3 Ohio Cir. Dec. 40 (1890).

⁹¹ *Edgarton & Wilcox v. Hanna, Garretson & Co.*, 11 Ohio St. 323 (1860); *White v. Gates*, 42 Ohio St. 109 (1884).

⁹² *Peoples Bank & Savings Co. v. Katz*, 146 Ohio St. 29, 65 N.E. 2d 708 (1946); *Lyric Piano Co. v. Mess*, 126 Ohio St. 224, 184 N.E. 834 (1933); *Graver v. Guardian Trust Co.*, 29 Ohio App. 233, 26 Ohio L.R. 227 (1928); *Wilder v. Martin*, 83 Ohio App. 209, 81 N.E. 2d 630 (1948).

⁹³ *Wilson v. Columbia Casualty Co.*, 118 Ohio St. 319, 160 N.E. 906 (1928).

⁹⁴ *In re Concklin*, 5 Ohio Cir. Ct. 78, 3 Ohio Cir. Dec. 40 (1890); *Ex parte Lilliland*, 7 Ohio Dec. Repr. 659, 4 Bull. 733 (1879).

⁹⁵ *Simmons Real Estate Co. v. Riestenberg*, 51 Ohio App. 176, 200 N.E. 139 (1935).

⁹⁶ *Wilder v. Martin*, 83 Ohio App. 209, 81 N.E. 2d 630 (1948); *Hoffman v. Weiland*, 64 Ohio App. 467, 29 N.E. 2d 33 (1940); *Hamilton v. Temple*, 60 Ohio App. 94, 19 N.E. 2d 650 (1938); *State, ex rel. Fulton v. Heinrich*, 48 Ohio App. 455, 194 N.E. 395 (1934); *Fleischer v. Commercial Motor Freight, Inc.*, 42 Ohio L. Abs. 65, 59 N.E. 2d 163 (1944).

⁹⁷ *Duffey v. Reardon*, 70 Ohio St. 328, 71 N.E. 712 (1904); *Dept. of Liquor Control v. C. D. Peters Ice & Coal Co.*, 52 Ohio App. 520, 3 N.E. 2d 981 (1935); *Dept. of Liquor Control v. Dispatch Printing Co.*, 20 Ohio L. Abs. 404 (1935).

one case the court held that a proceeding in aid of execution was a chancery case.⁹⁸ If so, it would be appealable on law and fact but in another case it was held that it was not a chancery case and an appeal on law and fact was not proper.⁹⁹

CONCLUSION

This article tends to point up the confusion in the law of Ohio relating to proceedings in aid of execution rather than to clarify it. The statutes themselves are in certain respects overlapping, vague and contradictory. The courts have further confused the law on the subject by confusing the statutes relating to garnishment before judgment with the statutes relating to proceedings in aid of execution after judgment. Like Topsy in "Uncle Tom's Cabin", the law on this subject was "never born" but "just grow'd" leaving it in the topsy-turvy condition in which we now find it. Another writer has already called attention to this state of confusion and suggested the need for reform.¹⁰⁰

It seems to us that the statutes upon the subjects of garnishments, proceedings in aid of execution and exemptions are lacking in uniformity or comprehensiveness and that a revision is long overdue. As the law now stands neither the judgment creditor, the judgment debtor nor the garnishee can be certain of his rights or obligations. Only through revision of these statutes can we obtain the uniformity and clarification necessary to define adequately those rights and obligations.

But see *First National Bank v. Clauss*, 26 Ohio Cir. Ct. 107, 16 Ohio Cir. Dec. 107 (1904).

⁹⁸ *Michigan State Industries v. Fisher Hardware Co.*, 50 Ohio App. 153, 197 N.E. 785 (1934).

⁹⁹ *American Insurance Union v. Reed*, 24 Ohio App. 192, 157 N.E. 314 (1927).

¹⁰⁰ Denlinger, *Garnishment of Wages in Ohio*, 21 U. OF CIN. L.R. 268, 276 (1952).